# A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution

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## I. INTRODUCTION

The history of law involves a longstanding relationship between private and public power. This relationship has evolved considerably, perhaps even taken a change in direction, since the emergence of the alternative dispute resolution (ADR) movement in the 1970s. During that period, and despite deep differences in the nature of public and private dispute resolution, the two have formed a marriage of sorts with the institutionalization of ADR in courts and the adoption of ADR-like techniques and procedures by judges. [1] Our contemporary dispute resolution landscape now includes instances of formalized dispute resolution alongside privatized judging with some viewing these developments as enhancing access to justice.[2] But this phenomenon has also received significant criticism for sacrificing both the unique nature of ADR and the commitment to public values and goals associated with formal litigation.

As in other fields, the emergence of powerful information technologies is changing the public/private relationship.[3] In the last twenty years, the field of online dispute resolution (ODR) has brought forth a new form of dispute resolution that defies traditional assumptions and goals that defined the field in the past. These changes are occurring because of the qualities of the "fourth party" (digital technology employed in dispute resolution)—enhanced efficiency through online communication, enhanced structure allowing simultaneously for consistency and tailored options through software design, and enhanced learning through data documentation and the

[1] Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-Formal,' in* REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419, 420 (Felix Steffek & Hannes Unberath eds., 2013) [hereinafter Menkel-Meadow, *Regulation of Dispute Resolution*].

[2] Mauro Capaletti, *Alternative Dispute Resolution Within the Framework of the Worldwide Access-to-Justice Movement*, 56 MODERN L. REV. 282 (1993).

[3] For an example of the shifting division between private life and the workplace, see Tamara Kneese *et al.*, *Understanding Fair Labor Practices in a Networked Age* 3 (Data & Soc'y, Working Paper, 2014).

study of dispute patterns and the connection between procedural choices and substantive outcomes.[4]

The combined effect of these qualities is to allow for the pursuit of public goals in dispute resolution without sacrificing the flexibility and efficiency that is associated with private dispute resolution. Through these, ODR can also allow for tailored and creative private processes to take place with structure and consistency that can alleviate concerns over arbitrary and capricious resolutions. The brief history of ODR uncovers the potential of digital technology to generate a new relationship between private and public dispute resolution, one that overcomes what have seemed like intrinsic tradeoffs between efficiency and fairness and between structure and flexibility, thereby strengthening both "access" and "justice." But such experience also teaches us that this potential can be missed where private power is left to its own devices without committing to the public goals of access to justice and fairness.

This article is structured as follows. Part II describes the rise of ADR and the emergence of a dispute resolution landscape in which private and public co-exist but are also in tension with one another. The assumption that an inherent tradeoff exists between efficiency (associated with ADR) and fairness (associated with due process in courts) colors the relationship between private and public justice in the pre-digital era, constraining possibilities for enhancing access to justice through alternatives to courts. Part III describes the impact of digital technology on dispute resolution, as evidenced in the emergence of a large number of novel disputes, but also in the rise of ODR, which offers a new set of tools and systems for addressing conflict through the application of online, automated processes. In Part IV we analyze the ways in which the qualities of ODR processes can transform the relationship between private and public dispute resolution from antithetical to potentially more symbiotic as well as the limitations of technological change without a deeper change in the values, culture, and legal environment into which such technology is introduced.

[4] ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 37–38 (2017). *See also* ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE (2001).

## II. PRIVATE AND PUBLIC DISPUTE RESOLUTION

### *A. The ADR Revolution*

#### *1. Dissatisfaction with the Courts and Rise of ADR*

As of the last quarter of the 20th century, mediation and, to a lesser extent, arbitration, were introduced into community and court settings. These processes were intended to be an avenue for addressing conflict in lieu of litigation.[5] While the ADR movement was united in calling for increased use of alternatives to litigation, there were different rationales put forward to justify the change. These included efficiency, convenience, flexibility, party satisfaction, [6] community empowerment,[7] and reduced costs.[8] This state of affairs generated a broad range of practices, and also meant that ADR became an umbrella term for a variety of processes, each grounded in different disciplines and methodologies.

One major source for adopting ADR was the growing discontent with the courts. This state of affairs led the Chief Justice of the United States to convene a conference in 1976 where leading practitioners, academics, and judges discussed the ills of the legal system and potential solutions to the problems.[9] The principal problems discussed were the high costs associated with a slow, complex and overburdened system.[10] The adoption of ADR held a promise for reducing caseload and costs that was attractive not only for the justice system, but was also significant for those concerned over the ability of disadvantaged disputants to bring their disputes before the courts. As we discuss below, an "access to justice" movement emerged in the 1970's, calling

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[5] *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 170 (2003); Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 291 (2003).

[6] Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN. ST. L. REV. 327, 328 (2003).

[7] Hensler, *supra* note 5, at 170–74.

[8] *Id.* at 174; Senft & Savage, *supra* note 6, at 332.

[9] Menkel-Meadow, *Regulation of Dispute Resolution*, *supra* note 1, at 420.

[10] JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 95 (1983).

for equal access to the legal system, and was also a source of support for ADR.[11]

During the Pound Conference, Professor Frank Sander presented his vision of a "multi-door courthouse," a place that would offer a multitude of processes for addressing different types of conflicts involving parties with varying characteristics.[12] Sander further developed this approach as he advocated "fitting the forum to the fuss," matching particular kinds of disputes to particular kinds of processes.[13] The basic insight regarding the need to tailor dispute resolution processes to the characteristics of the dispute and the parties also influenced the sub-field of dispute systems design[14] some years later, and, to a large extent, has justified the need for ODR in addressing disputes that arise online.

Another major rationale for adopting ADR had to do with the vision of justice advanced through such processes. Some ADR proponents did not focus on the high costs associated with litigation, but on the appeal of interest-based dispute resolution in terms of the quality of outcomes reached,[15] the low level of party satisfaction with the procedure employed,[16] and the impact of the resolution on the disputing parties' relationship and their future interactions, as well as considerations relating to the broader community.[17] Indeed, one of the strongest reasons for the appeal of interest-based dispute resolution processes was their promise of "win-win" resolutions, as described by Professors Roger Fisher and William Ury in "Getting to Yes"[18] and by

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[11] Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 184–85 (1977).

[12] Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 84 (A. Levin & R. Wheeler eds., West, 1979).

[13] Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 66 (1994).

[14] *See infra* text accompanying notes 38–44.

[15] Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 3 (1991) [hereinafter Menkel-Meadow, *Pursuing Settlement*].

[16] Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211 (2004).

[17] CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 228 (Wolters Kluwer Law & Business, 2004).

[18] ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40–55 (Penguin Group 1981).

Professor Carrie Menkel-Meadow who advanced problem-solving in legal practice.[19]

In terms of quality of outcomes, courts were criticized for their "limited remedial imagination," with most cases resulting in some form of monetary compensation.[20] This was in fact part of a much broader criticism of litigation as a process that was adversarial and rule oriented, instead of addressing parties' needs, interests, and feelings.[21] In particular, mediation was perceived to be more suitable than litigation for parties who had an ongoing relationship.[22] Instead of deepening the rift, as litigation often did, mediation could strengthen collaboration between the parties and supply them with future tools for improved communication and problem-solving.

Research on dispute resolution procedures uncovered the significant, even principal role that the process employed plays in how the parties perceive the fairness of what occurs, in particular the opportunity for their voice to be heard and the impartiality and even-handedness of the third party.[23] Courts, because of their case overload and complex procedures, often stifled opportunities for voice. For many disputants, having their "day in court," was more likely to materialize in ADR settings where the more relaxed atmosphere and emphasis on party direct participation allowed them to share their perspective. Later, as digital technology became part of the design of certain dispute resolution processes, the question of what constitutes procedural justice arose with elements such as speed of the process becoming more central than other features traditionally associated with procedural justice and disputant expectations.[24]

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[19] *See generally* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1983).

[20] Menkel-Meadow, *Pursuing Settlement*, *supra* note 15, at 7.

[21] Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

[22] Sternlight, *supra* note 5, at 190.

[23] John M. Conley & William M. O'Barr, *Litigant Satisfaction Versus Legal Advocacy in Small Claims Court Narratives*, 19 L. & SOC'Y REV. 661 (1985); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 888 (1997).

[24] *See generally* AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION (2017).

While much of the appeal of ADR processes had to do with benefits to individual disputants—the promise for a quicker, less expensive, more pleasant, flexible, and satisfactory process that could yield better, long-lasting solutions—they also offered advantages from a group perspective. Some voices emphasized the needs of minorities and other disempowered groups, uncovering the ways in which the formal legal system could be an oppressive force for such parties, a site where norms that were foreign to them were employed.[25] Mediation, on the other hand, could provide an opportunity to empower such individuals and communities by expanding their problem-solving skills and allowing community members to cite local norms, thereby enhancing the legitimacy of the process and its outcome.[26]

Interestingly, the broader "group perspective" was also at the heart of much of the criticism that would later be voiced against the institutionalization of ADR in the courts, as described in the following section.

### 2. *Critiques of ADR*

The spread of ADR, which accelerated in the 1990s with the enactment of The Civil Justice Reform Act of 1990 and the Dispute Resolution Act of 1998,[27] was accompanied by fierce critiques. One source of discontent was the belief that courts should be the principal arena in which disputes are resolved.[28] This approach, voiced most prominently by Professor Owen Fiss, advanced the idea that courts are a public body, endowed with the responsibility for resolving legal grievances.[29] Courts should not waive this function; disputes constitute the avenue through which courts declare public values and interpret them, address inequalities between opposing parties, and exercise continuing judicial involvement. By diverting disputes to private arenas, the law's reach is curtailed, precedents are not revisited or created, the law remains undeveloped in certain areas, and powerful parties are able

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[25] Hensler, *supra* note 5, at 170.

[26] *Id.*

[27] Menkel-Meadow, *Regulation of Dispute Resolution*, *supra* note 1; Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 609 (2005).

[28] *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

[29] *Id.*

to extort favorable settlements from their disadvantaged counterparts.[30]

Other critics emphasized the dangers that confidential ADR processes could pose for disputants, especially where disputants are of unequal power, resources and knowledge.[31] Researchers found that private processes could prove harmful for women, minorities, and consumers vis-à-vis their more powerful, wealthy and experienced counterparts.[32] Still other critics of ADR warned of the potential of private dispute resolution to depoliticize potential claims, transforming them into private misunderstandings rather than uncovering the broader context in which they grew.[33] Instead, ADR processes assigned problems to "miscommunication," highlighted the need for "mutual respect," and sought to achieve personal satisfaction by addressing personal needs and interests.[34]

Criticism, however, extended beyond that voiced by court-philes, and included even avid supporters of alternatives who were disappointed by the evolution of ADR. Some of the disillusionment related to the fact that ADR processes did not divert cases from trial and therefore disappointed hopes of increased speed and efficiency.[35] Perhaps more disturbingly, research revealed that in some instances, mediation processes failed to deliver the hope for a dispute resolution process that was qualitatively better than litigation.[36] In such

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[30] *Id.*

[31] *Id.*

[32] *See generally* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 (1979).

[33] RICHARD L. ABEL, POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 12 (Elsevier Science & Technology Books, 1981); CHRISTINE HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985); Hensler, *supra* note 5, at 196; Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. DISP. RESOL. 1 (1993).

[34] Sara Cobb, *The Domestication of Violence in Mediation*, 31 L. & SOC'Y REV. 397, 411–12 (1997); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC'Y REV. 497 (1993).

[35] Hensler, *supra* note 5, at 178.

[36] *See generally* James J. Alfini, *Trashing, Bashing and Hashing it Out: Is This the End of "Good Mediation?"*, 19 FLA. ST. U. L. REV. 47 (1991).

cases, ADR processes constituted pale versions of litigation that lacked important procedural protections and public scrutiny.[37] In fact, despite claims that ADR was what people wanted, ADR centers had great difficulty in attracting "clients."[38] Most disputants did not simply walk into ADR offices but were referred by the courts. This reality raised serious challenges to the ADR movement's manifesto and provided further fuel for external and internal criticism.

### 3. *Institutionalization of ADR in Courts and Organizations*

By the end of the 20th century, and in spite of criticism, adoption of ADR schemes had expanded greatly.[39] In many respects, the debate over privatization of justice, the role of courts, and the need for ADR had vanished.[40] Institutionalization of ADR spread broadly beyond courts and agencies, extending to private companies and organizations and giving rise to the phenomenon of "internal dispute resolution."[41] Organizations began adopting "conflict management systems" for addressing disputes involving employees and customers.[42] The seeds for this development were planted in 1989 with the publication of Ury, Brett & Goldberg's Getting Disputes Resolved,[43] and the adoption of such systems evolved into a field of its own—"Dispute Systems Design" (or DSD, as it was later referred to)—in the following decade.

While Ury et al.'s research was focused on wildcat strikes in the mining industry, their insight that the study of disputes over time in a closed setting could allow for prevention of future conflicts has become all the more significant for arenas other than workplaces in an era in

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[37] AUERBACH, *supra* note 10, at 135–36.

[38] Hensler, *supra* note 5, at 172.

[39] *See* Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is? "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 870 (2008).

[40] *See* Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1062 (1996).

[41] Edelman et al., *supra* note 34, at 502.

[42] DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 300–344 (2003).

[43] WILLIAM L URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 65–85 (Jossey-Bass Inc. 1988).

which data is stored digitally. The contribution of digital technology to prevent disputes was overlooked until quite recently, as the fields of dispute systems design and ODR developed in parallel universes. Dispute prevention in the DSD tradition was associated with the professional skills of ombudspeople and other dispute resolvers. These individuals drew on reflective practice and their ability to generate an "institutional memory" of disputing patterns, as opposed to an algorithmic study of disputing data, as would later be the case in certain online platforms.[44]

Over the decades since the publication of the Ury, Brett & Goldberg book, a plethora of books and articles appeared relating to dispute systems design, and a growing number of dispute resolution professionals were hired to deliver systems design expertise or internal dispute resolution services.[45] The literature ranged from practitioner-oriented "how to" manuals that offered step-by-step guides to systems design, to theoretical research projects that connected DSD-related issues to the major questions faced by the ADR field more generally. These included the relevance of systems design to private justice, the legitimacy of dispute systems design, and questions of power and culture in different types of processing disputes.[46] A central question remained as to how to ensure that dispute resolution systems function in a fair and effective manner. However, there was little discussion of how to use communication and information processing technologies in such ventures and what the impact of introducing digital technology would be on fairness, effectiveness and satisfaction.[47]

By the dawn of the twenty-first century, ADR processes, particularly mediation, came to dominate the dispute resolution landscape in the United States.[48] Litigation became a path of last resort,

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[44] Orna Rabinovich-Einy, *Deconstructing Dispute Classifications: Avoiding the Shadow of the Law in Dispute System Design in Healthcare*, 12 CARDOZO J. CONFLICT RESOL. 55, 78–80 (2010).

[45] Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 HARV. NEG. L. REV. 151, 157–58 (2012).

[46] *See generally* 14 HARV. NEG. L. REV. 289 (Winter 2009) (devoted in its entirety to the field of dispute systems design).

[47] Rabinovich-Einy & Katsh, *supra* note 45, at 162.

[48] Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994); Marc Galanter, *The*

but court decisions maintained their centrality as mediated resolutions and arbitrated decisions were shaped by the "shadow of the law."[49] Did these alternative fora deliver justice or could access to justice only be realized in a courtroom before a judge?

### *B. Courts and Access to Justice*

The Access to Justice Movement sought to reduce barriers that prevent low-income parties seeking to vindicate their rights from bringing their disputes before the court system.[50] Specifically, the Access to Justice Movement hoped to lower the costs of litigation for low-income disputants and to level the playing field for those who did reach the court.[51]

The most obvious barriers to the ideal of access to justice are economic ones—the need to pay a filing fee and to hire a lawyer. In addition, there are costs related to the time and energy that parties have to devote to litigation, which include having to miss work, attend court sessions, meet with one's lawyers, and strategize over the case. For low income disputants this has meant that they could not even pursue high stake disputes if an attorney were not provided to them. But even individuals of higher income levels have often found that the costs of litigation would exceed its expected benefits.[52]

Aside from economic barriers, there are barriers that operate on the geographic, psychological, linguistic, and cultural realms. Geographic barriers have to do with the unavailability of legal services in various locations.[53] Psychological barriers involve non-financial costs

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*Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460–61 (2004).

[49] *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979).

[50] On the changes in the legal and political environment that allowed such a movement to emerge in the U.S., see DEBORAH L. RHODE, ACCESS TO JUSTICE 62–69 (Oxford University Press, 2004).

[51] *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

[52] Earl Johnson, Jr., *Thinking About Access: A Preliminary Typology of Possible Strategies*, *in* 3 ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES 3, 9–10 (Mauro Cappelletti & Bryant Garth eds., Giuffrè Editore, 1978).

[53] Mark Blacksell, *Social Justice and Access to Legal Services: A Geographical Perspective*, 21 GEOFORUM 489, 499–500 (1990).

associated with having to go through a lengthy, oftentimes intrusive, legal process.[54] These barriers are subtle in nature, taking place in people's minds, sometimes subconsciously. Some of these barriers prevent not only the filing of a claim but even the recognition that they suffered a legal harm, that a particular person or entity is responsible for such harm, and that they are entitled to redress should they pursue their rights in court.[55] For those speaking a foreign language, legalese is twice removed and even communication with their lawyer, if they can afford one, is challenging.[56]

The recognition that courts were largely inaccessible due to the various barriers described above generated a range of reform efforts. Initially, calls for enhancing access to justice focused on financial barriers and the need for making available legal aid lawyers. These endeavors have been described as the "first wave" of the access to justice movement.[57]

The "second wave," which took place in the 1970s, took a broader view of the need for access, strengthening disadvantaged groups (as opposed to individuals) through public interest litigation and class actions.[58]

In the decades that followed, the original court-centric approach that stood at the heart of access to justice gave way to a more expansive approach to justice, one which recognized the important role that could be played by simpler, more accessible procedures. These developments, constituting a "third wave," led to the further growth of ADR schemes and various attempts to simplify court procedures.[59] Indeed, this is where the two movements—the ADR movement and the access to justice movement—converged. As the ADR movement matured, courts were no longer viewed as the sole or even principal site for obtaining

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[54] *Id.*

[55] William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 L. & SOC'Y REV. 631, 644 (1980).

[56] *See* Konstantina Vagenas, *A National Call to Action: Access to Justice for Limited English Proficient Litigants*, NAT'L CTR. ST. CTS. 2–10 (2013).

[57] MAURO CAPPELLETTI & BRYANT GARTH, ACCESS TO JUSTICE: A WORLD SURVEY (GIUFFRÈ EDITORE, 1978).

[58] *Id.* at 21.

[59] *Id.*

justice, and a broader vision of "justice in many rooms"[60] or a "multi-door courthouse"[61] where different processes aligned with different disputes, became popular. In reality, however, this gave rise to what was seen by some as a justice deficit due to the differences between private and public justice.

### *C. The Relationship between Private and Public Justice*

The growth of ADR procedures challenged the traditional understanding of "access to justice." As described above, with the spread of mediation in courts, a different vision of justice was advanced, one in which meeting individual interests and needs was given priority over the protection of rights and the establishment of standards. Consensual resolutions became preferred over judicial decisions.[62] Recognizing the value of ADR, many judges referred cases to mediation. In reality, however, mediation and arbitration were not always successful in realizing the hopes for swifter, cheaper and less adversarial dispute resolution processes.[63] While ADR sought to reduce access barriers, it could not eliminate them in light of the need to rely on human capacity and to meet in a physical space. In addition, over time, some of mediation's qualitative advantages were lost as ADR processes were assimilated in courts and ADR techniques were being employed by judges. As use of ADR became widespread in courts, these processes were, in a sense, co-opted.[64] Critics thus questioned the degree to which the institutionalization of ADR reduced access to justice barriers both in terms of "access" and "justice."

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[60] Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

[61] Sander, *supra* note 12.

[62] Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 42 (2002).

[63] MENKEL-MEADOW ET AL., *supra* note 17, at 406–09; Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 407–08 (2004); Menkel-Meadow, *Pursuing Settlement*, *supra* note 15, at 6; Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 HARV. NEGOT. L. REV. 61, 73–89 (2012); Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 874 (2012).

[64] Menkel-Meadow, *Regulation of Dispute Resolution*, *supra* note 1, at 419.

Despite the co-mingling of private and public justice and their mutual influences, private justice remained more private and flexible while public justice was more open and structured. These distinctions have stood at the core of what has been perceived as an inherent tradeoff between efficiency (associated with flexible and private procedures) and fairness (related to the structure and open nature of proceedings that meet due process requirements).

As the use of information technologies and internet communication expanded from the mid-1990s onwards, the numbers, characteristics and scope of disputes changed. This influenced the challenge of access to justice in different, sometimes conflicting directions. On the one hand, technology has exacerbated the problem of access to justice by generating a staggering number of disputes, many originating online, for which both courts and ADR are inadequate.

On the other hand, as we describe below, by creating novel infrastructures for convenient, inexpensive, and speedy dispute resolution and prevention processes that can handle previously unimaginable numbers of complaints, digital technology has been laying the foundation for a new reality of increased access to justice.[65] Because of the unique qualities of software and digital communication, online dispute resolution and prevention activities can now be conducted at a scale that was impossible in the past while allowing for individualized tailoring of procedural options. The shift to online resolution and prevention processes is also providing opportunities for more quality control and monitoring than was possible in the pre-digital era.[66] They are even providing an opportunity for a new relationship between efficiency and fairness as the use of algorithms increases.[67] However, the introduction of algorithms and data mining into the dispute resolution arena is hardly a one-sided development; it also establishes new barriers and challenges for access to justice, as the use

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[65] RICHARD E. SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 85–86 (Oxford University Press, 2013) (Conveying a broad understanding of access to justice in the digital age, one which includes not only dispute resolution, but also dispute containment, avoidance and "legal health promotion.").

[66] Orna Rabinovich-Einy & Ethan Katsh, *Lessons from Online Dispute Resolution for Dispute Systems Design*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 51 (Mohamed Abdel Wahab, Daniel Rainey & Ethan Katsh, eds., 2011).

[67] KATSH & RABINOVICH-EINY, DIGITAL JUSTICE, *supra* note 4, at 50–51.

of private platforms spreads and the complexity and opaqueness of algorithms grow.

## III. THE RISE OF ONLINE DISPUTE RESOLUTION

### *A. More Users, More Conflict*

For most of its first twenty or so years, the internet was, compared to what it is today, an immature and quiet network. There was email, a variety of discussion groups supported by a system called Usenet, and capabilities for storing files and sending them to others with internet access, but not much more. The internet needed the lifting of the ban on commercial activity in 1992, the development of graphical Web browsers in 1993, and the appearance of the first internet service providers shortly thereafter to accelerate the development of visually appealing sites that attracted new users and made information easily accessible.[68] As this occurred, disputes began to appear, initially in a scale that could be handled through "netiquette" and listserv moderators.

By the turn of the twenty-first century, the landscape of disputes on the Internet had changed significantly from its rather tranquil and sparsely populated state a decade earlier.[69] New types of disputes emerged online, often in large numbers, stemming from frequent interactions that took place virtually, often globally, in very short time frames, relying on algorithms and thin textual communication. For these types of disputes, traditional dispute resolution mechanisms—courts and ADR—were, for the most part, unavailable.[70] Novel means for addressing digital conflicts were needed, ones that could handle masses of disputes, rapidly, and at a low cost.

The need for new dispute resolution avenues became all the more pressing in the following decade as internet use skyrocketed, smartphones became a primary vehicle for online access

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[68] Ethan Katsh, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, 10 LEX ELECTRONICA 1, 3 (2006), http://www.lex-electronica.org/docs/10-3_katsh.pdf.

[69] KATSH & RABINOVICH-EINY, DIGITAL JUSTICE, *supra* note 4, at 25–29.

[70] *Id.* at 14–17.

for a growing number of people, and digital communication became a primary avenue for connecting with friends and colleagues, in addition to distant strangers. Conflicts relating to anonymous comments on forums, intellectual property breaches on YouTube, accuracy of edits on Wikipedia, harassment on Twitter, the posting of private pictures on Facebook, conduct of Uber drivers, and the content of a review on Airbnb have all become an integral part of online activity, and, consequently, of many people's lives in the second decade of the twenty first century.[71] These changes have increased dramatically the number of online transactions we are all engaged in and, as a result, many more problems and disputes are also arising online, or can be attributed in part to online activity. For many of these disputes, face-to-face dispute resolution—public or private—is de facto or de jure unavailable and ODR, where it is being offered, may be the sole dispute resolution avenue. Below we explore the evolution of the ODR field, drawing on several examples of ODR tools and systems that were developed over the course of the past two decades in response to the growing need for effective avenues of redress for digital disputes and, to a lesser extent, for traditional conflicts that arose face-to-face.

### *B. The Evolution of the Field of ODR*

#### *1. From Online ADR to ODR*

ODR emerged from an online environment that was rich with misunderstandings and disputes but deficient in avenues for effectively addressing them. Originally, ODR was not meant to displace, challenge or disrupt an existing legal regime or a familiar ADR process. Rather, its goal was to fill a vacuum by mimicking traditional ADR processes and offering online equivalents to these dispute resolution channels.[72]

In reality, however, the attempts to import ADR to the online setting proved to be a difficult task, as ODR processes possessed certain unique features that distinguished them from traditional dispute

[71] For information on the prominence of social media, see *Social Media Fact Sheet*, PEW RESEARCH CENTER (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/social-media/.

[72] KATSH & RABINOVICH-EINY, DIGITAL JUSTICE, *supra* note 4, at 25–29.

resolution: (1) they lacked face-to-face interaction; (2) they automatically recorded all dispute data, and (3) they were based on the intelligence of the machine.[73] While many of these features were initially viewed as shortcomings, over time they have come to be seen as potentially advantageous. Thus, for example, while the lack of face-to-face interaction reduces the richness of communication, it also conveys advantages for those who benefit from asynchronous communication (time to consult and conduct research before replying). Similarly, the decrease in privacy due to documentation can assist in quality control and dispute prevention efforts, as we explain below. Finally, the intelligence of the machine can enhance efficiency through automation, allowing ODR systems to handle staggering numbers of small scale conflicts at a low cost and in speedy timeframes.

### 2. *ODR Tools vs. ODR Systems*

The eBay ODR system is probably the best-known ODR system and the one with the most impressive achievements in terms of volume and systems design. In December 1998, the eBay ODR system asked the National Center for Technology and Dispute Resolution (NCTDR) at the University of Massachusetts to conduct a pilot project to see whether disputes between buyers and sellers could be mediated online.[74] The pilot project was a success with over two hundred mediations conducted in a two-week period through a link on the eBay site. Despite using email, which is a relatively unsophisticated technology, the mediator successfully resolved more than half of the disputes. Following the NCTDR pilot program, eBay contracted with SquareTrade, an internet start-up, to develop an ODR system that would address the types of problems that arose on the site and that could handle large numbers of disputes. The end-product was a two-stage process comprised of technology-assisted negotiation using online forms as a first stage to make claims and exchange demands, escalating to an online mediation involving a human mediator if no settlement were reached in the first stage.

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[73] Id. at 33–34.

[74] Ethan Katsh, Janet Rifkin & Alan Gaitenby, *E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of "eBay Law"* 15 OHIO ST. J. DISP. RESOL. 705 (2000).

The SquareTrade system was revolutionary in that it represented a shift in the attitude towards the digital medium; it was no longer considered necessary to mimic labor-intensive offline processes. Instead, the differences between communicating face-to-face and online were embraced, ultimately producing a new type of software-assisted process that had not existed in the physical environment. By substituting software for a human, technology-assisted negotiation could perform many of the tasks previously performed by a human facilitator and could easily scale to handle extraordinarily large numbers of cases. These tasks included identifying dispute types, exposing parties' interests, asking questions about positions, reframing demands, suggesting options for solutions, allowing some venting, establishing a time frame, keeping parties informed, disaggregating issues, matching solutions to problems and drafting agreements. [75] By extracting information from the parties and processing it, SquareTrade developed a Web-based system that could quickly respond to large numbers of disputes in the ways human mediators addressed a single dispute in face-to-face mediation. By 2003, when eBay hired Colin Rule to develop in-house systems for handling disputes between users of eBay and PayPal, the SquareTrade system was handling several million disputes. By the time Rule left in 2011 to start Modria.com, eBay systems were handling over sixty million disputes a year.[76]

The eBay ODR process was also significant in that it introduced the concept of an ODR system as opposed to an ODR tool. eBay is the paradigmatic example of an ODR system, which goes beyond the use of individual tools by linking together communications tools and information processing tools to build trust in users and resources for developing solutions. In an ODR system, data is provided which reveals patterns of disputes and generates opportunities to both facilitate and monitor consensual agreements, thus making disputes in the future less likely.[77]

Putting aside the eBay system, most contributions of technology to ODR thus far have involved the development of tools: the development

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[75] Steve Abernethy, *Trusted Access to the Global Digital Economy/Square Trade International ODR Case Study*, UNECE FORUM ONLINE DISP. RESOL. (Geneva, Switzerland, June 6-7, 2002).

[76] SCHMITZ & RULE, *supra* note 24, at 24.

[77] Abernethy, *supra* note 75.

of specific dispute resolution applications that can be used to resolve both online and offline disputes. Some tools focus on a narrow task that could help a neutral to resolve either online or offline disputes. Innovative ODR tools were in existence as of the late 1990s, and as mediators have become more comfortable generally in the use of technology, they have increasingly been looking for software applications that could perform a discrete function and could be plugged into their practice in some way.[78]

A variety of ODR providers including The Mediation Room[79] and Benoam[80] have been for quite some time now operating online platforms that allow mediators and arbitrators to exchange documents and communicate with parties without having to meet face-to-face. These ODR tools are now being used to facilitate the mediation process even when the disputants are in the same room and the conflicts emerged in the offline setting. From such a perspective, the future of ODR would seem to lie in an ongoing evolution of more and more powerful software that could be employed in more and more complicated contexts.

The developers of Cybersettle and Smartsettle software tools, for example, identified elements of the traditional dispute resolution process where the use of information was ineffective or inefficient. Cybersettle developed a fairly simple application that facilitated "blind bidding" online. Originally aimed at malpractice claims but useable in any negotiation involving money, the software would find a "zone of possible agreement"[81] between one side's offer and the other side's demands without the parties' having to reveal these figures to one another. The parties agreed that if the offer and demand were within a certain percentage of each other, they would split the difference and settle. If they were not within range, however, there would be no settlement and the offer and demand would not be revealed to the other party.

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[78] For example, the use of software for an online brainstorming process. *See* Ethan Katsh & Leah Wing, *Ten Years of Online Dispute Resolution: Looking at the Past and Constructing the Future*, 38 U. TOL. L. REV. 19 (2006).

[79] THE MEDIATION ROOM, http://www.themediationroom.com.

[80] BENOAM, http://www.benoam.co.il/.

[81] *See* ROBERT H. MNOOKIN et al., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 18–22 (Belknap Press of Harvard University Press, 2000).

Smartsettle, through the introduction of technology into interest-based negotiation, found that automated negotiation could increase the likelihood of parties reaching win-win outcomes. Building on the insights provided by game theory, the Smartsettle software had parties list their interests and assign numerical values to them, thereby creating a weighted spectrum of issues along which the parties could negotiate. Based on the parties' input, the software generated various "packages" or combinations of issues that might satisfy both parties. The software created a graph as a visual display of the level of satisfaction each package of issues represented for the parties in light of their own initial ranking of interests. Furthermore, a unique optimization feature suggested other combinations that might meet the needs of both parties better than what they had negotiated.[82] While these ODR *tools* have proven valuable for addressing individual disputes, they have often been less influential than ODR *systems* in making use of dispute data, which has become "Big Data."

As ODR transitions from applications that focus on communication and convenience to software that employs algorithms and exploits the intelligence of machines, data processing tools also open up opportunities for finding patterns of disputes, identifying their causes and designing preventative possibilities in the context of ODR systems. The digital trail associated with conducting dispute resolution processes allows both the improvement of dispute resolution processes over time through the monitoring of their performance, as well as the detection of patterns of disputes that can be prevented from arising in the future by addressing the source of the problem. Where ODR is offered as part of a system and data is accumulated over time, the preventative potential of ODR is enhanced substantially.

With the spread of digital technology and internet access shifting from personal computers to phones it has become increasingly difficult to distinguish between disputes that arose online to those that did not. Preferences have also changed with many more individuals preferring to conduct interactions online, whether the person or entity they are

[82] Ernest M. Thiessen & Joseph P. McMahon, *Beyond Win-Win in Cyberspace*, 15 OHIO ST. J. DISP. RESOL. 643, 647–48 (2000).

engaging with is a friend or stranger, located nearby or at a distance.[83] As these changes were occurring, disputes that arose in the physical environment or took place between parties who were located in the same vicinity also became candidates for online resolution. Thus, there has been growing interest in the development and adoption of ODR in many new settings such as government agencies, courts and tribunals in such places as the U.S., Canada, the Netherlands, the U.K. and Singapore, the European Union regulatory framework, and other international bodies.

Indeed, several jurisdictions' courts have been at the forefront of innovating justice systems in their approach towards the incorporation of digital technology into the courts. British Columbia, [84] The Netherlands,[85] the U.K.[86] and certain U.S. state courts[87] have moved beyond using technology for online filing and court administration, and have developed (or are in the process of developing) software systems for handling court cases online for such matters as small claims, divorce cases, neighbor disputes and outstanding warrants and traffic citations. These processes vary but include tailored online diagnosis and legal advice, automated negotiation, and online facilitation and adjudication. In this respect, ODR is operating differently than ADR had in the past—it is conducted by the legal system, as part of the litigation process—rather than siphoning off disputes from the courts, the litigation process itself is being re-imagined.

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[83] Daily Telegraph Reporter, Texting more popular than face-to-face conversation, The Telegraph (Jul. 18, 2012, 7:30 AM), http://www.telegraph.co.uk/technology/9406420/Texting-more-popular-than-face-to-face-conversation.html.

[84] CIVIL RESOLUTION TRIBUNAL, https://www.civilresolutionbc.ca (last visited Dec. 26, 2016).

[85] Interview with Maurits Barendrecht, Research Director, HiiL Innovating Justice (Aug. 11, 2015) (on file with authors).

[86] LORD JUSTICE BRIGGS, JUDICIARY OF ENGLAND AND WALES, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT 37 (July 2016), https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf; CIVIL JUSTICE COUNCIL, ONLINE DISPUTE RESOLUTION FOR LOW VALUE CIVIL CLAIMS 3 (Feb. 2015), https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.

[87] Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. OF RACE. & L. 205, 217 (2016).

As this trend of adopting ODR in the public sphere continues to grow, the nature of private and public justice is being transformed, re-shaping the way we think about each of these forms of justice and how to achieve access to justice.

## IV. MOVING BEYOND THE PUBLIC-PRIVATE DISTINCTION

Digital technology has challenged traditional public dispute resolution in ways that were unimaginable in the not too distant past. Who would have thought that online platforms would allow individuals to communicate across the globe, instantaneously, at virtually no cost, giving rise to many millions of disputes a year? This new reality has made the existing court paradigm of convening parties in one physical locale and conducting a lengthy, complex, face-to-face process seem obsolete in a growing number of contexts. In response, private entities began offering ODR for the new and growing body of online disputes. In this respect, digital technology made the problem of "private justice" more acute by increasing the scope and reach of private dispute resolution.[88]

At first blush, ODR seems to share many of the characteristics of private justice as traditionally understood: in both ADR and ODR substantive law occupies a peripheral role, they both lower access barriers to dispute resolution by enhancing efficiency and lowering costs associated with dispute resolution as well as empowering individuals at the expense of professionals and allowing direct participation for disputing parties. ADR and ODR, unlike courts, have both been seen as constituting creative, tailored, and contextual processes for addressing conflict.

At the same time, digital technology is changing some of the most basic characteristics of both public and private dispute resolution processes, thereby drawing them closer together and altering the relationship between them where dispute resolution is delivered via ODR. ODR's unique features—being conducted online, through software and leaving a digital trail—have made these processes distinct from both face-to-face ADR and traditional litigation. These features may reduce some of the problems that have been associated with both

[88] *See generally* Fiss, *supra* note 28.

private and public dispute resolution in the past, as ODR occupies a growing portion of the private and public dispute resolution arena.

The traits associated with ODR have the potential to generate three important shifts in the delivery of dispute resolution services:

- the shift from a physical setting to a virtual one;
- the shift from human intervention and decision-making to automated processes, and
- the shift from a privacy-conducive environment to one that revolves around data.[89]

The first shift means that in ODR parties communicate virtually and do not convene in a physical space. In terms of the public-private distinction, this change means that the privacy that has surrounded ADR is diminished, as all processes are conducted online and communications can be shared and accessed more easily by others, external to the process. Even court processes, which have always been public, have the potential to become more open than in the past, as information published online can be easily accessed and shared by the public, locally and globally. It also means that many of the differences between private and public processes in terms of access, cost and convenience are diminished with both types of processes, when delivered through ODR, becoming more affordable and easy to use.

The second shift, which introduced automated decision-making, offers a novel avenue for limiting human discretion in the resolution of disputes. While private justice is often associated with broad discretion and an environment of loose rules, public justice has sought to structure judicial decision-making through rules. As ODR is being introduced into both private and public settings, in both arenas algorithms become a new source of structure, holding a promise for enhanced consistency and reduced human bias, but also raising serious questions about the full impact of automated processes on the fairness of such processes, an issue whose implications remain unknown.[90]

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[89] KATSH & RABINOVICH-EINY, DIGITAL JUSTICE, *supra* note 4, at 46–47.

[90] Frank Pasquale & Glyn Cashwell, *Four Futures of Legal Automation*, 63 UCLA L. REV. DISC. 26, 39 (2015); Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 481 (2016) (on the challenges presented by algorithms to transparency); Tal Z. Zarsky, *Automated Prediction:*

The third shift, from processes that value privacy and seek to protect it to processes that allow for the documentation and ongoing evaluation of data gathered, has the potential to further blur distinctions between private and public justice in terms of monitoring the quality of the processes and the accountability of decision-makers and the system towards its users. The documentation of data in digital form allows for quality control over software design and human decision-making in ways that were not always present or even possible in courts where processes are conducted face-to-face. They are certainly unavailable in face-to-face ADR, given the privacy of proceedings and the tendency to refrain from data documentation. At the same time, technology is not neutral[91] and is designed by individuals who have their own biases, assumptions and values. However, the added structure that software affords (as opposed to a flexible face-to-face ADR process) and the data that is generated can also help uncover the biases in the design. While there may be challenges in terms of monitoring the nature and impact of automated interventions, there are also means for overcoming such difficulties through such means as audit trails,[92] although questions regarding the effectiveness of such monitoring remain, as do concerns over biases in the design of algorithms.[93]

Whatever the difficulties that are associated with automated decision-making, it is also imperative to bear in mind the problematic aspects of human dispute resolution. [94] Where biases cannot be prevented or uncovered on an individual basis, the documentation

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*Perception, Law, and Policy*, 15 COMMC'N. OF THE ASS'N FOR COMPUTING MACH., no. 9, 2012, at 33, 35; Tal Z. Zarsky, *The Trouble with Algorithmic Decisions: An Analytic Road Map to Examine Efficiency and Fairness in Automated and Opaque Decision Making*, 41 SCI., TECH. & HUM. VALUES, no. 1, 2012, at 118, 122–23 [hereinafter Zarsky, *The Trouble with Algorithmic Decisions*].

[91] Helen Nissenbaum, *Values in Technical Design*, *in* ENCYCLOPEDIA OF SCIENCE, TECHNOLOGY, AND ETHICS lxvi, lxvii (Carl Mitcham ed. 2005).

[92] Zarsky, *The Trouble with Algorithmic Decisions*, *supra* note 90, at 127.

[93] Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1261–62 (2008).

[94] Anjanette H. Raymond & Scott J. Shackelford, *Jury Glasses: Wearable Technology and its Role in Crowdsourcing Justice*, 17 CARDOZO J. CONFLICT RESOL. 115, 129 (2015); Zarsky, *The Trouble with Algorithmic Decisions*, *supra* note 90, at 120, 122. In many respects, this criticism is reminiscent of that of "court romanticists" against ADR enthusiasts in that the former tended to dismiss the problematic aspects of courts' operation while thoroughly criticizing ADR.

afforded through ODR allows problematic outcome patterns to be detected, exposing potential biases in the design or in specific third parties' decision-making. This type of analysis is already being performed on some e-commerce transactions by academics which has uncovered, for example, biases towards people of color in rental charges,[95] but it is unclear whether the platforms themselves have engaged in such examination with respect to dispute resolution-related data in efforts to improve such mechanisms.

Also, the shift towards digital communication is altering the focus in ODR from resolution to prevention because of the large amount of data that is available and allows for patterns to be discerned and addressed quickly, at times instantaneously. In this respect, ODR when introduced into the public sphere is moving public justice closer to private dispute resolution, where dispute prevention has been conducted for some time—albeit on a completely different scale—and would allow courts to function proactively, uncovering patterns of disputes and preventing future claims from arising by addressing the root cause problem before claims are filed, perhaps before potential claimants are aware of the harm and even before such harm has occurred.[96]

The three shifts could therefore potentially increase both "access" and "justice" transcending what has seemed like an inherent tradeoff between efficiency and fairness. Access can be increased through the efficiencies of online communication and algorithm-based interventions and the enhanced capacity to address disputes through automated systems. Justice could be enhanced through consistency, monitoring, and the proactive prevention of disputes of which potential disputants are unaware, unable, or reluctant to pursue.

As we can see, the relationship between ODR and formal law is different, and always has been different from the one that exists between ADR and adjudication. While ADR emerged as an alternative, ODR emerged where there were no dispute resolution avenues available for online disputes. Turning away from the court was not an ideal but a necessity. While ADR and courts represent alternatives with inherent tensions, ODR can move beyond an antithetical relationship with courts

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[95] Benjamin G. Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harvard Business School, Working Paper No. 14-054, 2014).

[96] Darin Thompson, *Dispute Prevention and Management in Online Dispute Resolution Systems* (draft) (on file with authors).

and overcome some of the tensions experienced between ADR and courts in light of the characteristics of the digital communication.

Under such new understanding of the public-private distinction in dispute resolution:

- ODR can be institutionalized in a public setting without ODR losing its unique, often non-adversarial character;
- a public setting can adopt ODR procedures in a wide array of settings without losing legitimacy;
- a private ODR system can be committed to fairness and consistency without losing its flexibility and sensitivity to context; and
- face-to-face processes can mitigate some of the tensions in the private-public connection by re-configuring some of their practices to enhance structure and fairness in ADR on the one hand, and flexibility and learning in public arenas on the other hand.

In reality, though, the potential for enhancing both efficiency and fairness through ODR and mitigating the tension between public and private justice remains unrealized. ODR in public settings is typically relegated to small scale conflicts, and draws on technology to make proceedings more efficient, but rarely re-imagines legal proceedings to allow for more input by users, fairness by decision-makers, and trust by the public.[97] Private ODR systems operate sporadically, failing to address a wide range of disputes that arise online.[98] Those disputes that are being addressed are handled with very little monitoring and disclosure regarding the fairness of procedures and outcomes reached, let alone about the nature of dispute prevention activities that are being performed. This reality of insufficient online avenues of redress and the

[97] There are some notable exceptions, which include the Rechtwijer system employed by the Dutch Legal Aid Board, the Civil Resolution Tribunal instituted in the British Columbia courts system and the Matterhorn software employed in certain U.S. state courts described above.

[98] *See generally* Ethan Katsh & Orna Rabinovich-Einy, *Technology and Dispute Systems Design: Lessons from the "Sharing Economy"*, 21 DISP. RESOL. MAG. 8 (2016).

lack of effective monitoring over the fair operation of online dispute resolution and prevention activities gives rise to "digital injustice."[99]

How do we move from digital injustice to digital justice? How do we ensure that private and public dispute resolution arenas incorporate technology in ways that enhance both efficiency and fairness, thereby increasing both *access* and *justice*? Some development in this direction can be expected to occur as a result of changes in preferences and expectations that will occur over time. For example, we can expect courts' adoption of technology—as that of other public institutions—to be influenced by what is taking place in the private sector. As people become accustomed to wide adoption of technology by private bodies, they will grow to expect that a broader range of services in the public sector also be available to them online, and be designed in an accessible, easy to use, and intelligible manner.[100] With respect to private platforms, we can expect users to exert pressure that such platforms assume responsibility for problems that arise amongst users, even where they do not involve the platform directly,[101] as well as commit to accessible and fair dispute resolution mechanisms for those conflicts that arise between the platform and its users[102] (as opposed to the now prevalent form of pre-dispute binding arbitration clauses, which have been approved by the U.S. Supreme Court, but are increasingly being critiqued, even by some public authorities).[103]

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[99] KATSH & RABINOVICH-EINY, DIGITAL JUSTICE, *supra* note 4, at 171–80.

[100] Jennifer Beese, *Social Media & Government: Cutting Red Tape for Increased Citizen Engagement*, SPROUT SOCIAL (Aug. 31, 2015), http://sproutsocial.com/insights/social-media-and-government/ (stating that "14% of Americans use social media to find information about a federal agency, while 30% use social either to ask the government a direct question or to resolve an offline issue").

[101] Indeed, this has been the trend—large entities such as eBay, Facebook, Twitter, and AirBnB have increasingly assumed responsibility for problems between users, not only addressing problems once they arise but also investing substantial efforts at problem prevention through such measures as improving content on the site, changing the structure of transactions and employing content moderation for text uploaded by users.

[102] Most platforms employ some form of pre-dispute arbitration clause for disputes between them and their users, often precluding users' ability to pursue a class action against the platform. These clauses have been subject to fierce critiques. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 1804 (2015).

[103] Amie Tsang, *Morning Agenda: Consumer Agency Moves to Assert Bank Customers' Right to Sue*, N.Y. TIMES (May 5, 2016), http://news.blogs.nytimes.com/2016/05/05/morning-agenda-consumer-agency-moves-to-

Spontaneous change, however, will in all likelihood remain limited in scope. Current incentives for each of the public and private justice arenas to stay as they are with the former focusing on improving efficiency and case closure, and the latter focusing on access for strong users who can impact the scope of transactions conducted through such private entities. In order to ensure digital justice—the widespread availability of avenues of redress, designed with all stakeholders in mind, which ensure fair and effective resolution and balanced prevention efforts—regulation will be required. Such regulation will require ongoing monitoring of the systems and processes in place as well as data on resolution and prevention efforts and their outcomes, evaluating their impact on individual disputants and on groups of disputants that belong to suspect groups. Such examination could, if conducted rigorously, uncover instances of bias in the design and operation of such systems. Oversight by an external body that can share success stories, as well as problematic aspects, could create incentives for ongoing improvement and a dynamic understanding of digital justice and the means for achieving it.[104]

## V. CONCLUSION

A longstanding tradeoff has been assumed to exist between private and public dispute resolution: private justice delivers efficiency through flexibility and privacy, while public justice delivers fairness by relying on fixed rules that embody public values and by ensuring consistency. The tradeoff between fairness and efficiency has been accepted by both proponents and critics of ADR as an inherent feature of dispute systems design, challenging efforts to enhance access to justice through the widespread adoption of ADR mechanisms.

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assert-bank-customers-right-to-sue/?rref=collection%2Ftimestopic%2FConsumer%20Financial%20Protection%20Bureau&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection&_r=1.

[104] Regulation of ODR providers should draw on "experimentalism," a regulatory model that is different from both traditional hierarchical models of regulation and self-regulatory systems. For a comprehensive description of experimentalism, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). *See also* SCHMITZ & RULE, *supra* note 24, at 78–79 (emphasizing the need for public and private involvement in the monitoring of ODR).

The introduction of digital technology into dispute resolution in the form of ODR systems and tools holds the promise for overcoming the tradeoff between efficiency and fairness, and delivering processes that are both more efficient and fairer through private and public justice avenues. Despite these developments, the broader context in which private and public dispute resolution mechanism operate often serves as a barrier to change in perceptions about the design, operation, and goals of dispute resolution systems. Innovative regulation schemes could overcome such barriers and create the necessary incentives for the design and adoption of fair and effective ODR systems in private and public settings.